IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 32 OF 2002.

Sunil Tamonkar,
s/o Mahabaleshwar Tamonkar,
r/o H. No. 193, Mazalwada,
Assagao. ... Appellant.

Versus

State through Anjuna Police
Station. ... Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 10th July 2003.

ORAL JUDGMENT.

The appellant, being aggrieved by his conviction for offences punishable under Sections 354 and 376(2)(f) of the Indian Penal Code and sentence of rigorous imprisonment for one year and fine of Rs. 1,000/-, in default simple imprisonment for one month and rigorous imprisonment for 10 years and fine of Rs. 6,000/-, in default simple imprisonment for 6 months respectively, passed by the IInd Additional Sessions Judge, Panaji, by Judgment, dated 8th July 2002, in Sessions Case No. 27 of 2000, has filed the present appeal challenging the aforesaid conviction and sentence.

2. The facts as are necessary for the decision of

the appeal are stated hereunder:-

In the year 1998 P.W.12 P.I. Nandakishore Raikar was attached to Anjuna Police Station. On 2nd January 1999, P.W.2 Levi Anyanwu lodged a complaint, at Exhibit 17, against the appellant/accused. On the basis of the said complaint, an offence vide Crime No. 3/98 under Section 354 of the Indian Penal Code was registered. P.W.12 P.I. Raikar handed over the investigation to Head Constable Wadkar. Thereafter, on 17th January 1999, a wireless message was received from the Goa Medical College, Casualty Department, that P.W.3 Metabel was admitted in the Goa Medical College as a case of sexual assault. On receipt of the said wireless message P.W.12 P.I. Raikar immediately went to the Hospital and met P.W.4 Helen, mother of P.W.3 Metabel. P.W.12 P.I. Raikar was not allowed to record the statement of P.W.3 Metabel and was informed by P.W.4 Helen that her husband P.W.2 Levi would go to the Anjuna Police Station on the next day and give his statement. A station diary entry to that effect, Exhibit 49, has been recorded by P.W.12 P.I. Raikar. Since P.W.2 Levi did not appear at the Police Station on the next day, P.W.12 P.I. Raikar went to the Goa Medical College at Bambolim. At the Hospital P.W.2 Levi was again requested to give his statement but, he stated that he would consult the doctor and would come to the Police

Station later on. According to P.W.12 P.I. Raikar the complainant came to the Police Station subsequently after he had handed over charge of the Anjuna Police Station to P.W.10 P.S.I. Sandesh Chodankar. He has also stated that, on 28th December 1998, P.W.2 Levi had come to the Police Station and had requested him to warn the accused as he was harassing his daughter.

3. P.W.10 P.S.I. Chodankar added Section 376(2)(f) of the Indian Penal Code after taking over the investigation. On 13th January 1999, typed supplementary statements came to be presented by P.W.2 Levi and P.W.4 Helen. Scene of Offence panchanama, at Exhibit 26, in the presence of P.W.6 Satchit Naik, came to be drawn. A letter, Exhibit 32, was addressed by P.W.10 P.S.I. Chodankar for examination of the accused. The report of the examination of the accused is at Exhibit 13. P.W.1 Dr. Silvano Sapeco had examined P.W.3 Metabel on 7th January 1999. On examination he found that there were old healed tears for the infantile hymen at 5 and 8 o'clock positions. There was no active bleeding on touch. There was no evidence of active inflammation. There were no perineal tears. P.W.1 Dr. Sapeco, therefore, opined that the local physical examination was suggestive of old attempted penetration. The report of the examination of P.W.3 Metabel is at Exhibit 9. P.W.3 Metabel was referred for determination

of her blood group by letter at Exhibit 11.

4. P.W.9 P.S.I. Wilson D'Souza took over the investigation from P.W.10 P.S.I. Chodankar on 15th March 1999. After the receipt of the report from the Central Forensic Science Laboratory at Exhibit 24, a charge-sheet against the present appellant/accused came to be filed.

5. The learned IInd Additional Sessions Judge, vide Exhibit 6 colly, framed a charge against the appellant/accused for an offence punishable under Section 354 of the Indian Penal Code, for having outraged the modesty of P.W.7 Goldah and for an offence punishable under Section 376(2)(f) of the Indian Penal Code for having committed rape on P.W.3 Metabel. The appellant/accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 12 witnesses.

6. The pivot of the prosecution case is the evidence of P.W.2 Levi, who had filed the complaint at Exhibit 17. P.W.2 Levi states that he has three children, namely, P.W.3 Metabel, P.W.7 Goldah and P.W.8 Maxwell. These children were under the care of the housekeepers, namely, Maria and Rekha. At this juncture, it may be stated that though the statements of

Maria and Rekha were recorded during investigation, both Maria and Rekha were not examined by the prosecution. P.W.2 Levi further states that he had gone to Madras with his wife P.W.4 Helen for urgent work and had returned on 13th December 1998. On 26th December 1998, P.W.7 Goldah, on seeing the accused, had stated that the accused had touched her private parts and had kissed her. P.W.3 Metabel on being so questioned had disclosed that the accused had not only touched her private part but had put his penis in her private part. On further questioning, P.W.3 Metabel had stated to him that the accused had taken her to a house in an abandoned place. P.W.2 Levi, therefore, went to the house of the appellant/accused to confirm the facts. However, the father of the accused was not present. According to P.W.2 Levi, on 27th December 1998, he had gone to the Anjuna Police Station to lodge the complaint against the accused for having committed rape on P.W.3 Metabel. According to him, P.W.12 P.I. Raikar refused to lodge the complaint. P.W.2 Levi further states that P.W.12 P.I. Raikar told him that the accused is from the village and that the locals would be mobilised to attack him. He states that P.W.12 P.I. Raikar registered a case of outraging the modesty on 2nd January 1999. He then took his daughter P.W.3 Metabel to the Goa Medical College. He has identified his complaint at Exhibit 17. Accordingly, on 13th January 1999, P.W.2 Levi had given

a complaint to P.W.10 P.S.I. Chodankar.

7. In the cross-examination he has admitted that between 13th December 1998 till 26th December 1998 P.W.2 Levi was in the house alongwith his wife and children. He further states that when his daughter P.W.7 Goldah had revealed the incident, his wife was present. He further states that he could not go to the Police Station on 26th December 1998, since his wife was suffering from serious attack of Asthma. He has further stated that he had signed the complaint at Exhibit 17 without reading the complaint and has volunteered that he has signed it as he was frightened because of the threats given by the police. Incidentally it may be stated that this complaint at Exhibit 17, which is alleged to have been filed on 2nd January 1999, refers only to the allegation of outraging the modesty. The subsequent complaint filed on 13th January 1999, states that, on 26th December 1998, P.W.7 Goldah had narrated to him the entire incident. P.W.3 Metabel is also alleged to have informed him about the alleged rape. However, a report at Exhibit 48, dated 28th December 1998, has been proved to have been lodged by him, in which it is stated that the appellant/accused is harassing his two daughters, named Goldah and Metabel by abusing them. In the said complaint it was requested that the appellant/accused be warned to behave. Certain

omissions have been brought out qua Exhibit 17 regarding the allegations of rape.

8. P.W.4 Helen, mother of P.W.3 Metabel and P.W.7 Goldah, states that she returned from Madras around 13th December 1998. She states that on her return her children had informed her that the appellant/accused had started getting friendly with one of her maids named Rekha. She states that between 13th to 26th December her children did not tell her anything. She further states that, on 26th December 1998, her daughter, by pointing to the accused, had informed her that the accused used to take her to a nearby abandoned house and thereafter put his fingers in her private part. She further states that, on questioning P.W.3 Metabel, P.W.3 Metabel had informed her that the accused had committed rape on her. She states that the accused when confronted with these allegations, on the next day, denied them. She further states that, on disclosure of these incidents, she was in a state of shock and that is the reason why immediately no report was lodged. Certain omissions have been brought out in the cross-examination in respect of what her son P.W.8 Maxwell had told her.

9. P.W.3 Metabel states that during the time her parents were away at Madras, the accused had taken her

to a broken house and had caused hurt to her "by putting his penis in my private part". She further states that she had informed Rekha and Maria about what the accused had done to her. She further states that, since the accused had threatened her, she had not informed her parents. In the cross-examination an omission has been brought on record that she had not stated in her statement that the accused had caught hold of her hand, had taken her to a broken house and then hurt her. Omission was also brought on record that she had not stated in her statement that the accused took her near a well and had threatened to throw her in the well in case she disclosed the incident to her parents. She further states that she had informed her sister P.W.7 Goldah and her brother P.W.8 Maxwell about the incident on the same day.

10. P.W.7 Goldah states that one day while they were playing the accused had pulled her by her hands and had taken her to a broken house. The accused had then put his finger and had touched her private part. The accused had repeated his acts on the second occasion near the bushes. She also states that the accused had threatened her near the well that he would throw her in the well in case she disclosed this incident to her parents. She also states that she had informed Rekha about what the accused had done. She has admitted that

she did not state in her statement that the accused had taken her to the well and had threatened her.

11. P.W.8 Maxwell, brother of P.W.3 Metabel and P.W.7 Goldah, states that his parents returned from Madras around 13th December. He further states that he informed his parents about what had been done by the accused to his sisters soonafter the arrival of his parents. He also states that he had told Rekha and Maria what had been informed to him by P.W.7 Goldah and P.W.3 Metabel. He further states that P.W.7 Goldah and P.W.3 Metabel had also informed Rekha and Maria of what had been done by the accused.

12. According to P.W.2 Levi and P.W.4 Helen, they had learnt about the incident on 26th December, when they were informed by P.W.3 Metabel, P.W.7 Goldah and P.W.8 Maxwell of what the appellant/accused is stated to have done. The serious allegation of rape does not find place in the report at Exhibit 17. According to P.W.2 Levi, the report was not scribed as per his narration and only the allegation in respect of outraging the modesty was mentioned in the said report by the police. Without entering and deciding the question whether the police had deliberately not recorded the information as per the statement of P.W.2 Levi, a reference may be made to Exhibit 48, which is a report submitted by P.W.2 Levi

prior to the report at Exhibit 17. This report at Exhibit 48 is dated 28th December 1998. Admittedly, according to P.W.2 Levi, he was made aware about the allegations of outraging the modesty and of the appellant/accused having committed rape on P.W.3 Metabel on 26th December 1998. The report at Exhibit 48 contains no reference to any allegations of either outraging the modesty or the appellant/accused having committed rape on P.W.3 Metabel. This report refers only to the fact of the appellant/accused harassing his two daughters named Goldah and Metabel by abusing them. It is incomprehensible as to why the report at Exhibit 48, dated 28th December 1998, does not contain any reference to the allegations of outraging the modesty and rape. Both P.W.2 Levi and P.W.4 Helen were aware about the incident on 26th December 1998. If that is so, then Exhibit 48, which is filed just two days after they had gained information, surprisingly makes no reference to the allegations, which are now made in this case. The absence of any allegations regarding outraging the modesty and rape militates very heavily against the prosecution case. The absence of these allegations affect the credibility of not only P.W.2 Levi and P.W.4 Helen, but, casts a doubt whether in fact, P.W.3 Metabel and P.W.7 Goldah had narrated anything to P.W.2 Levi on 26th December 1998. It is no doubt true that the medical evidence suggests of old

attempted penetration. However, unless and until the prosecution establishes by cogent and reliable evidence that it was the accused, who had committed the alleged rape on P.W.3 Metabel, the corroborative medical evidence would be of no avail to the prosecution. In the present case, therefore, the absence of averments regarding rape and outraging the modesty in the report at Exhibit 48 casts a serious doubt on the very fabric of the prosecution case. This renders the narration of the events by P.W.3 Metabel and P.W.7 Goldah highly doubtful.

13. Apart from this, the prosecution has not examined Rekha and Maria, whose statements were, admittedly, recorded in the trial. According to P.W.3 Metabel, P.W.7 Goldah and P.W.8 Maxwell, they had informed Rekha and Maria about the incident on the very day of the incident itself. The examination of Rekha and Maria as witnesses for the prosecution was very vital as it would have established the immediate disclosure alleged to have been made by these witnesses. For some inexplicable reasons, the prosecution has chosen not to examine them as witnesses. The conduct of P.W.3 Metabel, P.W.7 Goldah and P.W.8 Maxwell in not informing their parents about the incident on their arrival is also suspicious. According to these witnesses, they had not informed their parents

immediately because of the threat of the accused. If really the accused had threatened these witnesses, it is inexplicable as to how these witnesses claimed to have disclosed the incident to Rekha and Maria undeterred by the threats.

14. Therefore, considering the prosecution evidence, according to me, the prosecution has not been able to establish the offences against the appellant/accused beyond reasonable doubt. The appellant/accused, therefore, is entitled to benefit of doubt and is, thus, entitled to be acquitted.

15. Accordingly, Criminal Appeal is allowed. The conviction and sentence passed against the appellant/accused by the IInd Additional Sessions Judge, Panaji, in Sessions Case No. 27 of 2000 is, hereby, quashed and set aside and the appellant/accused is acquitted of the aforesaid charges.

(P.V. HARDAS)
JUDGE.

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